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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

FILED

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No. 1290

JAMES A. MURRAY and EDITH B. MURRAY, partners, doing business as NASSAU CHINA COMPANY,

Petitioners,

v.

THE HONORABLE ROY W. HARPER, Judge of the United States District Court for the Eastern and Western Districts of Missouri,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit

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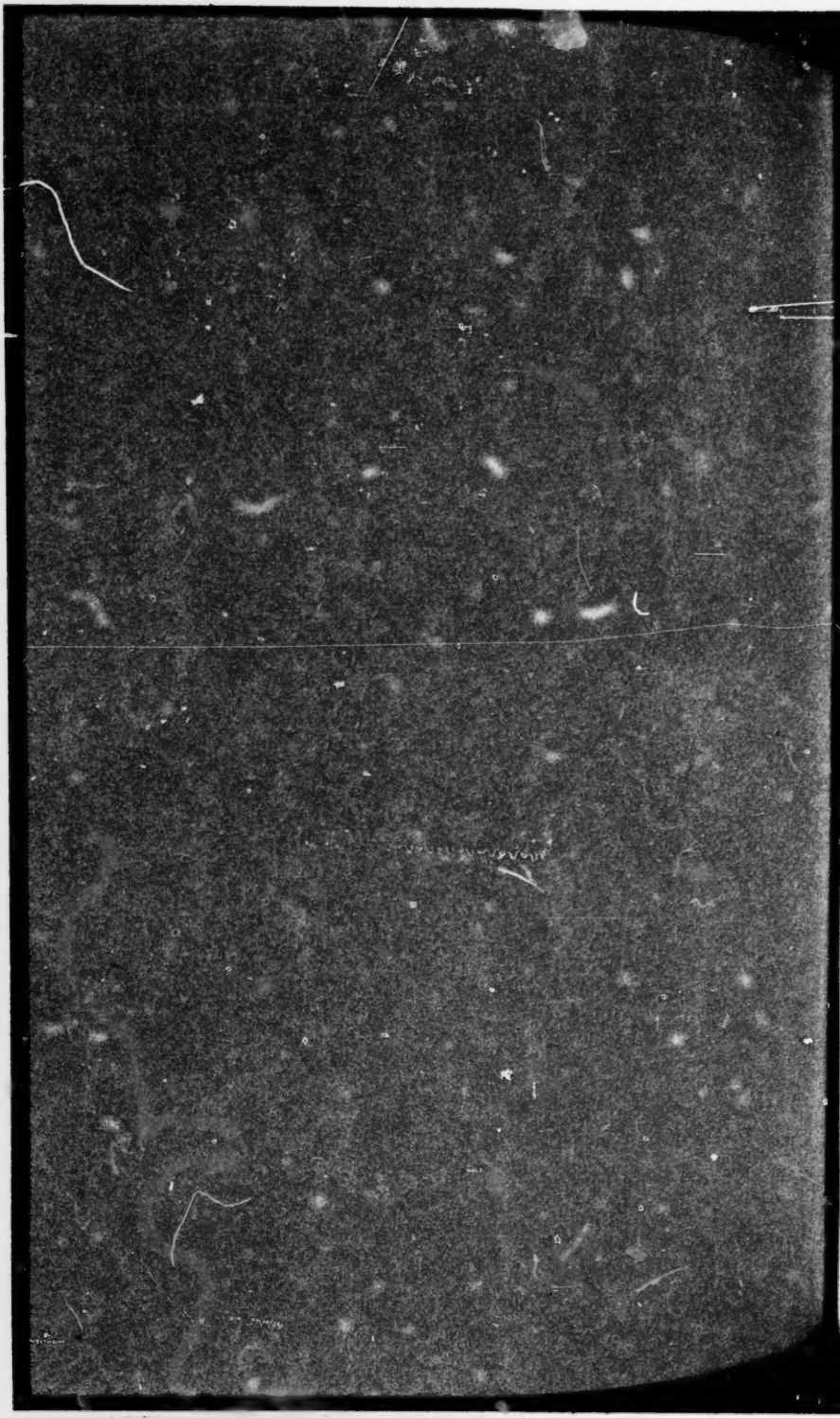

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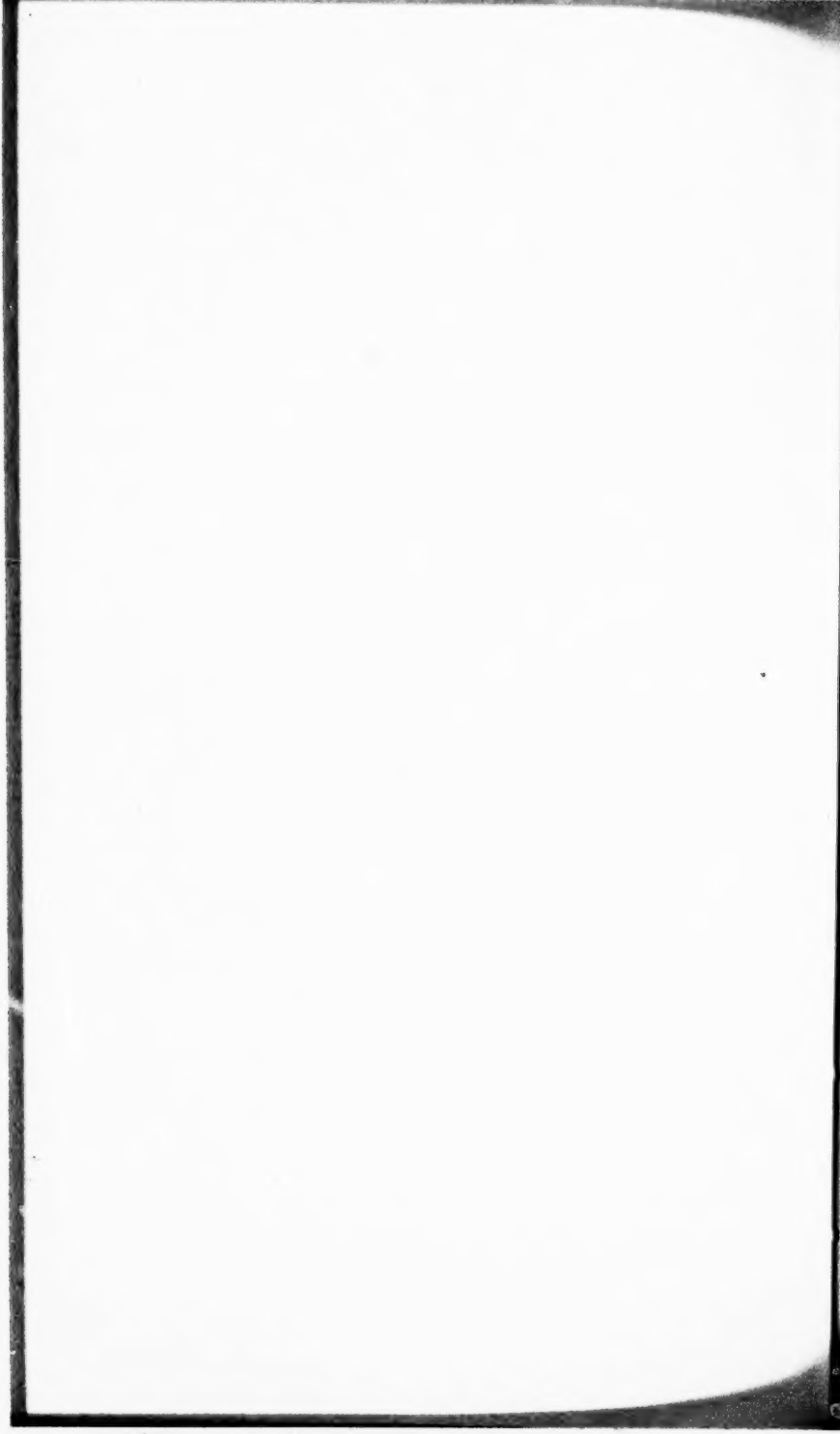

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IN THE

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OCTOBER TERM, 1969

No.

JAMES A. MURRAY and EDITH B. MURRAY,
partners, doing business as NASSAU
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Petitioners,

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THE HONORABLE ROY W. HARPER,
Judge of the United States District
Court for the Eastern and Western
Districts of Missouri,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit

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The petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eighth Circuit, entered on December 9, 1969, denying a petition for a writ of mandamus and/or prohibition filed in the above-entitled cause.

OPINIONS BELOW

The Court of Appeals wrote no opinion in denying the petition for a writ of mandamus and/or prohibition. Its order of December 9, 1969, denying the petition is unreported and is reprinted in the Appendix hereto.

District Judge Roy W. Harper, the respondent herein, entered two memorandum opinions in denying petitioners' motion to change judge. Neither is reported. His memorandum opinion and order dated September 8, 1969, denying that motion, and his memorandum opinion and order of October 29, 1969, denying rehearing of the order of denial, are reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit denying the petition for a writ of mandamus and/or prohibition, as to which review is hereby sought, was entered on December 9, 1969. This petition for a writ of certiorari was filed less than 90 days from the entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. §144 as interpreted in *Berger v. United States,* 255 U.S. 22 (1921), a federal district judge is automatically disqualified upon the filing of a good faith affidavit of prejudice by a party to the case.

2. Whether a federal district judge must disqualify himself, in accordance with 28 U.S.C. §144, upon the filing of good faith affidavit alleging the party's belief that the judge has shown a judicial bent of mind that may prevent or impede impartiality of judgment, that

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belief being supported by the following reasons and facts set forth in the affidavit:

(a) That the judge had accepted his designation and had continued to participate and make rulings in the case without revealing the fact, which he was later forced to concede, that he is a member of a fraternity that has a direct interest in the outcome of the case and that has been named but not served as a defendant in the litigation.

(b) That the judge, without revealing the need for, the number of, or the contents of the discussions or whether other persons were present, concededly engaged in *ex parte* discussions about the case with another judge who had previously been forced to disqualify himself on charges of bias and prejudice filed by another party.

(c) That the judge, immediately upon his assignment to the case and by resort to sources entirely outside the record and that were not before him in the ordinary course of the litigation, acquired biased and partial prejudgments as to the facts and the law, in accordance with the views previously expressed by his disqualified predecessors and in favor of the opposing parties.

(d) That the judge had refused to make available or to permit the petitioners to examine an extrajudicial document from which he acquired his understanding of the prior lengthy proceedings and from which he formulated certain prejudicial and biased judgments about the case.

(e) That the judge, by persistently disregarding petitioner's request and rights, had exhibited a pattern of conduct and a lack of candor that manifest unfairness to the point of a denial of due process, such action being totally inconsistent with any concern to preserve impartiality.

3. Whether the provisions of 28 U.S.C. §144 that a party may file "only one such affidavit in any case" prohibits a party from filing an affidavit of prejudice where an affidavit had previously been filed by another party in a separate though related civil antitrust case, resulting in the disqualification of the predecessor judge in all the related cases. Whether, if there be such a prohibition, 28 U.S.C. §144 is consistent with the Due Process Clause of the Fifth Amendment of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, §144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.[1]

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[1] See 28 U.S.C. §452, as amended in 1963 (77 Stat. 248), which abolishes "terms" in the federal district courts and provides generally that the continued existence or expiration of a "session" of court "in no way affects the power of the court to do any act or take any proceeding."

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STATEMENT OF THE CASE

The petitioners herein seek review of the Eighth Circuit's refusal to issue a writ of mandamus and/or prohibition directing that the respondent district judge, the Honorable Roy W. Harper, disqualify himself in accordance with 28 U.S.C. §144 from further participation in certain private antitrust proceedings pending in the United States District Court for the Western District of Missouri, Western Division, *Murray, et al. v. Balfour, et al.*, No. 737.

The proceeding out of which this problem arises is but one of thirteen related antitrust cases (referred to hereinafter as the Balfour cases) that have been extensively and bitterly contested and that have long been pending in the District Court below, the first two having been filed in 1959.[2] These various Balfour cases, including the instant one, essentially involve the claim by the respective antitrust plaintiffs that the L.G. Balfour Company, a leading manufacturer and distributor of college fraternity insignia and jewelry, conspired with various fraternities – including Phi Delta Theta, Delta Theta

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[2] The first two of these 13 cases were commenced on February 20, 1959, when Sigma Chi and Phi Delta Theta fraternities, instigated by Balfour, filed separate trademark infringement actions against a small Missouri jeweler, who in turn filed antitrust counterclaims against each fraternity. The average "age" of all cases is more than 8 years. They were docketed in the District Court below as Nos. 683, 684, 729, 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194. The petitioners' case, No. 737, has been pending since January 20, 1961. On October 17, 1969, the two fraternities dismissed their infringement actions and the counter-claims were simultaneously settled in consideration for the payment of a small sum.

Phi and Lambda Chi Alpha – to violate the federal antitrust laws to the injury of the respective plaintiff manufacturers and distributors of college jewelry. While these fraternities have been named as defendants in this litigation, none has actually been served. Moreover, during the pendency of this litigation, an independent proceeding before the Federal Trade Comission (Docket 8435) led to a determination in 1968 that the L.G. Balfour Company did violate the antitrust laws as alleged herein, a determination that is now pending on appeal to the Court of Appeals for the Seventh Circuit.[3] *L.G. Balfour Company, et al. v. Federal Trade Commission*, No. 17236 before the Seventh Circuit.

Prior Judicial History

In capsule form, the unusual and disturbing judicial history of the Balfour cases has been as follows:

(1) The Balfour cases were originally assigned to the Honorable Richard Duncan, then Chief Judge for the Western District of Missouri.

(2) Upon Judge Duncan's retirement in 1965, the cases were assigned to the Honorable John W. Oliver of the Western District of Missouri. Judge Oliver, however, in anticipation that an affidavit of bias would shortly be filed against him, recused himself on April 1, 1968, upon

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[3] The law fraternity Delta Theta Phi, on May 29, 1969, sought leave of the Seventh Circuit to file a brief *amicus curiae*, alleging that its "rights" had been placed in jeopardy by the Federal Trade Commission determination. Judge Harper has admitted his membership in Delta Theta Phi, stating that "when I was in school I became a member of Delta Theta Phi legal fraternity." Supplemental Affidavit of Prejudice, p. 3.

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the ground – as stated in his "Memorandum and Order of Transfer" – that he was a member of Phi Delta Theta Fraternity. That "Memorandum and Order of Transfer" is reproduced in the Appendix hereto.

(3) Judge Oliver's order of April 1, 1968, further directed that the Balfour cases be transferred to the Honorable William R. Collinson of the Western District of Missouri. But on July 3, 1969, Judge Collinson issued an order – reproduced in the Appendix hereto – sustaining a motion for change of judge and disqualifying himself from further participation in the Balfour cases. That order was made in response to an affidavit of bias and prejudice filed by J.A. Buchroeder & Company, by its president and chief stockholder, in Cases Nos. 683, 684 and 729, in which it was the party plaintiff. In that affidavit it was alleged that Judge Collinson was a member of Lambda Chi Alpha Fraternity, a named defendant in the Balfour cases; and it was further alleged and never denied (even for the record) that Judge Collinson had made biased determinations and had improperly attempted to influence the decision of another judge in another district in a related matter so as to secure a determination favorable to the defendant Balfour.

(4) While not directly involved in the history of the litigation in the District Court below, it is noteworthy that in a related antitrust case in the United States District Court for the Central District of California, *J.A. Meyers & Co. v. Lloyd G. Balfour, et al.*, Civil Action No. 67-118 – IH, in which many of the college fraternities here involved have been named as party defendants, District Judge Irving Hill found it necessary to recuse himself because he was "a life member of one of the defendant fraternities, friendly with its national officers, recipient of a number of honors from it and quite active in its alumni

affairs." See Order to Reassign Case, signed by Judge Hill on August 16, 1967, in Appendix hereto, p. A-19.

(5) On July 17, 1969, the petitioners were advised by the Clerk of the Western District that "the Honorable Roy W. Harper, Chief Judge of the United States District Court for the Eastern District of Missouri, now has the above-entitled [Balfour] cases" and that "Judge Harper plans to hold a conference in Kansas City, Missouri in the next week or ten days and expects all counsel to be present." Thereafter ensued certain events leading to the filing of affidavits of bias and prejudice against Judge Harper.

The First Affidavit Respecting Judge Harper

On or about August 21, 1969, the petitioner James A. Murray filed an affidavit of prejudice in his case, No. 737, supported by an appropriate certificate of counsel, pursuant to 28 U.S.C. §144. This affidavit, contained in the certified record before this Court, asserted that the respondent Judge Roy W. Harper had demonstrated personal bias and prejudice "against the antitrust plaintiffs, including myself, and in favor of the antitrust defendants" in the following particulars:

(1) Judge Harper from the start accepted as true a version of the facts and of the law previously expressed by the disqualified Judge Collinson, a version that had been challenged as indicating bias and prejudice on Judge Collinson's part and that in part had led to his disqualification. Paragraphs 13 and 14.

(2) Judge Harper, at the pretrial conference of July 29, 1969, revealed two extrajudicial sources for the biased prejudgments he had already formed when the conference began: (a) a conference or discussion with Judge Collinson concerning the case at a time when both judges

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knew that Judge Collinson was disqualified to act further in the Balfour cases, and (b) a rather voluminous bundle of legal size white sheets containing typewritten material, to which Judge Harper constantly referred while discussing the case with counsel and issuing directives therein. Judge Harper declined to reveal the nature of the latter documents, other than to say they had been prepared for him by "the clerk," and he declined to allow counsel to see or examine the papers. Counsel for petitioners requested that a court reporter be called in to record the conference, in light of the foregoing, but the request was ignored, with the explanation by Judge Harper that he had not expected that anything would happen at the first pre-trial conference. Paragraphs 15 and 16.

Judge Harper, in his Memorandum Opinion and Order of September 8, 1969, held that such an affidavit was inadequate to compel his disqualification under 28 U.S.C. §144 for the following reasons:[4]

(a) The mere fact that an affidavit of prejudice has been filed by the plaintiffs does not, Judge Harper said, automatically require a judge to disqualify himself. The judge must "initially determine the legal sufficiency of the affidavit and the facts that are stated therein." The burden on the affiant was said by Judge Harper to be threefold: (*i*) to state facts with particularity, not conclusions; (*ii*) to state facts so as to convince a

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[4] Although not permitted by any rule of practice, the counsel for the defendants L. G. Balfour Co., *et al.*, filed a motion to strike the affidavit of prejudice, the motion for change of judge and the certificate of counsel "for the reasons that the pleadings are legally insufficient." Fifteen pages of "suggestions" in support of that motion to strike were also filed. Judge Harper did not purport to grant or otherwise rule on the motion.

reasonable man that bias or prejudice exists; and (*iii*) to state facts showing a personal rather than judicial bias." Purporting to utilize these standards, Judge Harper held the instant affidavit was insufficient.

(b) Treating Case No. 737 (the instant one) as one of the series of thirteen Balfour cases assigned to him, Judge Harper felt that because of the identity of the issues and the fact that Judge Collinson had disqualified himself as to all thirteen cases, the affidavit of the present petitioner (James A. Murray) must be viewed as barred under the language of 28 U.S.C. §144 that "A party may file only one such affidavit in any case." The prior affidavit of John A. Buchroeder, filed in Cases Nos. 683, 684 and 729, which led to Judge Collinson's disqualification in all thirteen cases, was viewed as the one and only affidavit allowable under §144 as to all thirteen of the cases.

(c) Alternatively, "if it be determined that this [Buchroeder affidavit] is only applicable to Cases Nos. 683, 684 and 729," Judge Harper held that the present affidavit of the petitioner Murray was insufficient since (1) the assertions respecting Judge Collinson are not applicable with respect to Judge Harper, (2) the facts and allegations as to the July 29, 1969, conference, which were summarized and not denied, "does not meet requirements necessary for the judge to disqualify in the case." The affidavit was said not to disclose any bias or prejudice personal to the petitioners and not to allege any facts establishing that Judge Harper was personally biased or prejudiced against them.

The Supplemental Affidavit Respecting Judge Harper

Following this denial of the Motion for Change of Judge, the petitioners upon inquiry of Judge Harper for

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the first time learned that he was and is a member of the Delta Theta Phi legal fraternity, one of the named defendants in the Balfour litigation pending before him.[5] As a consequence of acquiring this information, which Judge Harper had not previously revealed, the petitioners filed a motion for rehearing of the denial of the Motion for Change of Judge. Attached to that motion for rehearing was a Supplemental Affidavit of Prejudice setting forth the facts concerning Judge Harper's fraternity affiliation, accompanied by an appropriate certificate of counsel. It was there pointed out that while Delta Theta Phi had not been expressly named in the original complaints in the various Balfour cases, it had been so named in the various amended complaints, including the one which petitioners obtained leave to file. It was further alleged that the interests of Delta Theta Phi were directly and critically involved in this litigation in general and in petitioners' case in particular. See paragraphs 10-12, 16.

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[5] On September 21, 1969, on instructions from the petitioners, counsel for petitioners made written inquiry of Judge Harper "whether or not Your Honor has ever at any time been a member of or in any way connected with such organization ["social, professional (*e.g.* legal) or honorary fraternity"] or organizations and if so, the name or names of the organizations, if any, with which Your Honor ever at any time had any such connection."

On September 30, 1969, Judge Harper replied: "With respect to your inquiry in your letter of September 21st on behalf of your clients, Mr. and Mrs. Murray, when I was in school I became a member of Delta Theta Phi legal fraternity. Since I have been on the bench I have been made an honorary member of the Order of the Coif. I assume that this is the information you desire."

Supplemental Affidavit of Prejudice, pp. 2-3; see p. A-11, *infra.*

Judge Harper, as indicated in his Order of October 29, 1969, denying the motion for rehearing, did not deny his membership in Delta Theta Phi. Nor did he deny that such fraternity, as a named defendant in the Balfour litigation, had a direct and substantial interest in the outcome of the litigation. Indeed, he did not purport to deny the motion on the theory that an affidavit alleging such a membership and such a direct interest was inadequate in terms of §144. He merely stated that petitioners' counsel had "represented to me that none of the plaintiffs in any of the cases intended to proceed against any of the fraternity or sorority defendants" and "further indicated to me that he would dismiss these defendants from the various cases within a month."[6] See pp. A-11, A-12, *infra.*

Because of the unique and continuing nature of the alleged bias and prejudice exhibited in this litigation by Judge Harper, the petitioner James A. Murray also filed in the Eighth Circuit a Second Supplemental Affidavit of Bias and Prejudice. It is contained in the certified record before this Court. See *In re Union Leader Corporation,* 292 F.2d 381, 388 (1st Cir. 1961); *Los Angeles Trust Deed & Mortgage Exchange v. S.E.C.,* 285 F.2d 162, 173 (9th Cir. 1960), respecting the discretionary authority of a Court of Appeals to permit and entertain

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[6] But he did not reveal in this memorandum opinion that he had pressed counsel to dismiss the fraternity defendants without revealing at that time that he was a member of Delta Theta Phi, which would benefit from such a dismissal. The fraternities had been in the litigation from the start and no previous judicial pressure had been brought to secure such a dismissal.

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a supplemental affidavit of bias filed on the appeal.[7] That affidavit serves to update the prejudicial attitude expressed by the judge and to confirm the petitioners' belief that the judge has a personal bias and prejudice against them and in favor of the defendants Lloyd G. Balfour, *et al.* In summary, this additional affidavit alleges that, subsequent to the filing of the affidavits in the District Court, Judge Harper continued and augmented his prejudice against the petitioners. Citing numerous instances of such prejudice, the affidavit asserts that the judge has systematically and without explanation denied each and every request of the petitioners for relief from obvious grievances and patent violations of recognized pre-trial procedures. Applying a double standard in treating the parties, he has invariably favored the defending parties, and perpetuated and added to the discriminatory nature of prior rulings of disqualified judges.

It should also be noted that the petitioners reached their belief that Judge Harper was personally biased and prejudiced against them within three days of their first exposure to him at the pre-trial conference of July 29, 1969. On August 1, 1969, their counsel wrote Judge Harper suggesting that the admitted consultation with Judge Collinson disqualified Judge Harper and expressing the hope that Judge Harper would voluntarily withdraw

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[7] Counsel for the defendants L. G. Balfour Co., *et al.*, filed in the Court of Appeals a motion to strike the Second Supplemental Affidavit of Bias and Prejudice, and the accompanying certificate of counsel, on the ground that the affidavit and certificate had never been filed in the District Court nor presented to Judge Harper. The Court of Appeals did not act on this motion and thus presumably entertained the affidavit and certificate in the course of denying the petition for mandamus and/or prohibition.

without the necessity of filing an affidavit of prejudice. Paragraph 19 of the original affidavit of petitioner James A. Murray. That fact, combined with the affidavits that were subsequently filed, demonstrates that at no time since Judge Harper was assigned to this case has he exhibited an attitude calculated to allay the fears and beliefs of the petitioners as to his bias and prejudice.

Finally, certain significant consequences flowing from the alleged bias and prejudice of Judge Harper are obvious from the facts of record recited in the various affidavits on file in this case. To wit:

(1) Judge Harper, by perpetuating certain biased rulings of the disqualified Judge Collinson, has effectively denied petitioners the right to submit to the jury vital evidence bearing on the issue of damages inflicted on petitioners by the defendants' antitrust conduct, as well as Balfour's suppression of such evidence. Judge Collinson, having first given petitioners permission to inquire into the suppression of such crucial evidence by Balfour, revoked that permission and invited a motion to impose sanctions on the petitioners and their counsel for having sought the inquiry in the first place. And Judge Harper has not only approved the ban on any further investigation of this issue but has declared that he will consider imposing the threatened sanctions "somewhere at the appropriate time." But for the bias thus shown against petitioners' legitimate efforts to uncover relevant evidence, the petitioners would be able to submit such evidence to the jury at the trial.

(2) Judge Harper's alleged bias has so operated as to effectively block petitioners' pre-trial discovery and to force them to go to trial without an adequate opportunity to complete such discovery. Thus he has (a) perpetuated a supplemental pre-trial order of a disqualified judge that ignored petitioner's previously established priority of

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discovery and allowed open-ended discovery in total disregard of an expired terminal date set by the original pretrial order and (b) permitted the defendants to engage in prolonged discovery that can terminate only shortly before the trial date, while not allowing discovery by the petitioners during that period, and (c) established an imminent trial date and required a narrative statement of the facts by the petitioners prior to the end of the defendants' prolonged discovery so as to foreclose all further meaningful discovery by petitioners and to force them to trial without a fair opportunity to discover all relevant facts pertinent to their case.[8]

(3) Judge Harper's foregoing actions have imposed so heavy a financial burden on the petitioners in participating in defendants' prolonged discovery hearings, without a full opportunity to develop the relevant facts as to liability and damages, as to render futile and ineffective the private right of action given them by Congress to recover damages for a violation of the antitrust laws. By perpetuating the biased rulings of two prejudiced judges, rulings that may well be void, Judge Harper has added to the crippling of that remedy.

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[8] Judge Harper ordered the petitioners to file their narrative statement by March 2, 1970, on pain of dismissal of their complaints, a date prior to the completion of discovery by the Balfour defendants. That order was also entered with knowledge that petitioners had not completed their discovery and had sought for over two years to secure an extension of time for that purpose. Judge Harper denied the request for an extension on October 17, 1969, without prejudice to renewing the request after completion of the defendants' discovery – a meaningless right in view of the scheduling of the first trial for April 7, 1970.

The Order of the Eighth Circuit

The petitioners herein, on Thursday afternoon, December 4, 1969, filed in the Eighth Circuit a Petition for a Writ of Mandamus or Prohibition, attaching thereto the relevant affidavits and memorandum opinions and orders of Judge Harper. The application was made pursuant to Rule 21 of the Federal Rules of Appellate Procedure, and was premised on the unquestioned jurisdiction of the Eighth Circuit to entertain such an application seeking to force a federal district judge to disqualify himself before trial once an affidavit of prejudice has been filed pursuant to 28 U.S.C. §144. See *Minnesota & Ontario Paper Co. v. Molyneaux*, 70 F.2d 545 (8th Cir. 1934); *Rosen v. Sugarman*, 357 F.2d 794, 796-797 (2d Cir. 1966); and see *Berger v. United States*, 255 U.S. 22, 36 (1921), stating that "the remedy by appeal is inadequate."

Five days later, on Tuesday, December 9, 1969, the Eighth Circuit filed an order, subscribed to "BY THE COURT," stating that "Upon due consideration of petition for writ of mandamus or prohibition and supporting documents, it is ordered that the petition should be and the same is hereby denied." See Appendix hereto, p. A-1, *infra*. This order was entered *sua sponte*, there having been no answer ordered by the court or submitted by any of the respondents. No briefs were filed, other than the arguments contained in the petition itself, and no oral argument was held. No opinion was rendered. The petition was denied on its merits, there being no jurisdictional problem apparent in the court order.

REASONS FOR GRANTING THE WRIT

Two major factors justify the grant of certiorari in this case: (1) the refusal of the Eighth Circuit to give serious consideration to, or to resolve, the questions raised in the petition for a writ of mandamus and/or

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prohibition; and (2) the intrinsic importance of the questions raised in that petition, and repeated herein, in the context of the fair administration of justice in the federal courts.

I.

The Eighth Circuit has evaded its responsibility to guard against the possibility of bias in the trial of cases within that Circuit.

The action of the Eighth Circuit in summarily denying the petition for writ of mandamus or prohibition filed by the petitioners can only be viewed as an evasion of that tribunal's primary responsibility to guard against the possibility of bias in the trial of cases within that Circuit – particularly a case that is one of the oldest on the dockets of the Circuit wherein two prior judges had been disqualified for bias.

That court concededly had discretionary authority, under Rule 21 of the Federal Rules of Appellate Procedure, to dispose of the petition without calling for a response or permitting full briefing and argument. But that petition raised a variety of challenges to the fairness of a trial judge, challenges that were of a most substantial, important and novel nature. Left unanswered and unresolved, those challenges reflect gravely upon the quality of even-handed justice to which litigants within the Eighth Circuit may be subjected. As this Court has emphasized, the due process requirement of a fair trial in a fair tribunal necessitates not only an absence of bias at trial but steps "to prevent even the probability of unfairness . . . [in order to] 'satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955). Such an endeavor to prevent the appearance of unfairness suggests the need for a more thorough consideration of petitioners' challenges to Judge Harper than that afforded by a summary rejection of the mandamus petition five days after it was filed.

The Eighth Circuit cannot be said to have made a real effort to insure that fairness prevails in trials within its supervisory jurisdiction or that litigants may feel relieved of their fears in that respect. It has declined to perform its high function of testing and resolving the most serious kind of challenge that can be made to a court or a judge. And it has cast upon this Court the burden of reviewing those challenges in the first instance without benefit of the Eighth Circuit's considered views or the refinement of issues that might have ensued from a more thorough treatment of the petition filed below.

But the issues that survive the Eighth Circuit's inaction are of such significance to the federal judiciary and to litigants generally as to warrant review of the order below despite that inaction.

2. A significant and recurring problem is raised as to the meaning and effect of this Court's decision in Berger v. United States, 255 U.S. 22 (1921).

Assuming, as we must, that the Eighth Circuit's summary order reflected satisfaction and agreement with the two memorandum opinions of Judge Harper, a highly important and recurring problem is raised as to the meaning and effect of this Court's decision in *Berger v. United States*, 255 U.S. 22 (1921).

Put simply, the problem that has confused and misled the lower federal courts is a failure to understand that the *Berger* decision means that a judge is automatically disqualified upon the filing of an affidavit of bias and prejudice that meets the formal requirements of 28 U.S.C. §144. That section provides, in essence, that whenever a party "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice . . . such judge shall proceed

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no further, but another judge shall be assigned to hear such proceeding." The second paragraph of §144 adds that the affidavit "shall state the facts and the reasons for the belief that bias or prejudice exists" and "shall be accompanied by a certificate of counsel of record that it is made in good faith."

Fairly read, the critical holding in *Berger*, 255 U.S. at 33, is that this language of §144

> ". . . permits an affidavit of personal bias or prejudice to be filed, and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and, in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another."

In so ruling, the Court expressly rejected the Government's contention in that case that "the motion and its supporting affidavit, like other motions and their supporting evidence, are submitted for decision and the exercise of judicial judgment upon them" and the further contention that "the action of the affidavit is not 'automatic' . . . but depends upon the substance and merit of its reasons and the truth of its facts, and upon both the judge has jurisdiction to pass." 255 U.S. at 30-31.

In other words, the *Berger* decision determined that the filing of an affidavit in compliance with §144 results in the automatic disqualification of the judge without regard to any judicial assessment of the merits of the allegations of bias in the affidavit. When the Court indicated (255 U.S. at 32) that the trial judge should determine the "legal sufficiency" of the affidavit, as distinguished from "the truth of its statements," the Court

was indicating that the judge could do no more than determine whether the affidavit satisfied the formal terms of the statute – i.e., whether it was timely filed, whether it was accompanied by a certificate of counsel, and whether it stated "the facts and the reasons for the belief that bias or prejudice exists." Implicit in the latter requirement, of course, is that "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." *Berger v. United States, supra,* at 21; *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). But beyond making a determination as to whether the facts or reasons do in fact relate to "something other than rulings," the judge cannot concern himself with the truth, the reality or the sufficiency of the facts or reasons. 255 U.S. at 33.

The Court in *Berger,* moreover, expressly recognized (255 U.S. at 33) the criticism that might be leveled at its ruling "giving an automatism to the affidavit which overrides everything" and depriving the judge of power to assess "the reality and sufficiency of the facts" asserted in the affidavit. Frivolous and false facts or reasons might be asserted and to permit them to serve as an automatic disqualification of the judge, it was urged, would be most undesirable. But such a contention, said the Court, "is a misunderstanding of the requirement" of §144 "that 'the affidavit shall state the facts and reasons for the belief' of the existence of bias and prejudice." 255 U.S. at 33. Without destroying the automatic nature of the disqualification upon the filing of an affidavit in proper form, the precaution against such abuse is to be found in two factors: (1) the certificate of good faith by counsel, with the penalties implicit in an attorney's false swearing; and (2) the penalties attached to perjury by the affiant. Such sanctions, the Court said, were even sufficient to guard against or penalize the failure of the affidavit to present facts and reasons that "give fair support to the charge of a bent

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of mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34.

The *Berger* ruling is the only definitive examination of §144 by this Court, and no retreat from or modification of the principles therein enunciated has ever been announced by this tribunal. Rendered in 1921, some ten years after the original enactment of the statute, 36 Stat. 1090 (1911), the *Berger* ruling gives effect to the Congressional purpose that upon the filing of a good faith affidavit the judge is automatically and immediately disqualified and that any assessment of the inadequacies or improprieties of the affidavit is to be made by the successor judge. See 46 Cong. Rec. 2626-2627 (1911).[9]

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[9] The federal statute was patterned after an Indiana statute that provided for automatic disqualification upon the filing of an affidavit. As stated by the sponsor of the bill that was to become §144 (Rep. Cullop), once an affidavit has been filed, "the judge shall proceed no further" and if the affidavit is to be reviewed "it would be by the judge who is called in to succeed him." 46 Cong. Rec. 2627 (1911). See also Note *Disqualification of Judges Because of Bias and Prejudice*, 51 Yale L. J. 169, 171 (1941).

At least five other states now have statutes providing that a simple allegation of bias by the litigant, without the statement of any supporting facts or circumstances, automatically disqualifies the judge. E.g., Ariz. Rev. Stat. Ann. §12-409 (1956); Cal. Civ. Proc. Code §170.6 (Supp. 1965); Idaho Code Ann. §1-1801 (1948); Nev. Rev. Stat. §1.230(5) (1957); Ore. Rev. Stat. §14.260 (1953). It has been said that this automatic disqualification procedure "goes very far in assuring that each litigant will feel confident that his trial is being impartially conducted." Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435, 1437 (1966).

But the lower federal courts have engrafted a series of conditions upon disqualification that are not to be found in either the language of §144 or the *Berger* ruling. As stated by one commentator, "the clear *Berger* decision, the clear statute, and its clear legislative history have not been followed in practice, and federal trial practice still does not provide a litigant with the automatic change of venue to which he is apparently entitled upon filing an affidavit in good faith." Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 629 (1947).

Taking out of context the *Berger* language that "the reasons and facts for the belief the litigant entertains . . . must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," 255 U.S. at 33-34,[10] the lower courts have emasculated the *Berger* ruling and §144 by imposing on the litigant the burden of alleging facts with sufficient particularity so as to convince the accused judge that it

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[10] This statement from the *Berger* opinion appears in the context of the Court's explanation that the possibility that irresponsible affidavits might be filed – including those that do not set forth reasons and facts that "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" – does not detract from the "absolutism" of the disqualification dictated by the filing of a good faith affidavit in compliance with the formal requirements of §144.

The Court pointed out that the requirement that the affidavit contain a statement of the facts and reasons for the belief as to bias "is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attaching to perjury." This Court gave no indication that the accused judge was authorized to examine into the legal merits or sufficiency of the asserted reasons.

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is fair to conclude that he is personally biased or prejudiced. Time and again these courts have asserted that it is the duty of the accused judge – rather than his successor – "to pass on the sufficiency of the affidavit as a matter of law" and to recuse himself only if the allegations "are sufficient to support the conclusion that the judge has a personal bias or prejudice against the defendant or in favor of the plaintiff." See, *e.g.*, *United States v. Bell*, 351 F.2d 868, 878 (6th Cir. 1965); *Rosen v. Sugarman*, 357 F.2d 794, 797-798 (2nd Cir. 1966); *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2nd Cir. 1968); *Gallarelli v. United States*, 260 F.2d 259, 261 (1st Cir. 1958); *Lyons v. United States*, 325 F.2d 370, 376 (9th Cir. 1963); *In re Union Leader Corporation*, 292 F.2d 381, 389 (1st Cir. 1961); *United States v. Hoffa*, 245 F. Supp. 772 (E.D. Tenn. 1965); *United States v. Hanrahan*, 248 F. Supp. 471, 475 (D.C.D.C. 1965); *Boyance v. United States*, 275 F. Supp. 772 (D.C. Pa. 1967); *Town of East Haven v. Eastern Airlines, Inc.*, 293 F. Supp. 184 (D.C. Conn. 1968).

These post-*Berger* rulings of the lower courts have sought to shift the focus of §144 away from automatic disqualification to a discretionary assessment of the substantiality and merits of the facts and reasons asserted. They have reincarnated many of the arguments rejected by the Court in *Berger* by equating disqualification with the presentation of facts and reasons that are persuasive, *to the judge accused of bias*, that bias actually exists. These decisions have cast upon the accused judge a function that the *Berger* ruling said was not his to pursue, "the delicate and trying duty of deciding upon the question of his own qualification."[11] Yet this refusal by the

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[11] This quotation was taken by the Court from Judge Meek's opinion in *Henry v. Speer*, 201 Fed. 869 (5th Cir. 1913). The

(Continued)

lower federal courts to apply the plain language of §144 in accordance with the *Berger* reading is completely without legislative sanction. Indeed, when Congress in 1948 revised the Judicial Code and reenacted the provisions of §144, it may be said to have acquiesced in the *Berger* interpretation of those provisions. *United States v. Elgin, J. & E. R. Co.*, 298 U.S. 492 (1936). Certainly, Congress at that point cannot be said to have acquiesced in any contrary lower court interpretations. *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947). The *Berger* interpretation must still remain controlling and decisive, a fact that makes the refusal of the lower courts to accept that interpretation a major problem in judicial administration that only this Court can resolve.

The memorandum opinions and actions of Judge Harper in this case, as approved by the Eighth Circuit, constitute a classic example of the judicial erosion by the lower courts of the language of §144 and of the decision in the *Berger* case. His opinion of September 8, 1969, expressly rejected the very essence of that statute and of that decision, *i.e.*, to use his words, "the mere fact that an affidavit of prejudice has been filed does not

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Footnote 11 (Continued)
Henry case, which was cited by this Court with approval, is instructive as to the extent of the duty of the accused judge in passing on the legal sufficiency of the affidavit. The affidavit in *Henry* had been found insufficient not because of any lack of merit or legal sufficiency in the supporting reasons but because the affidavit failed to charge a "personal" bias as required by §144.

The Court in *Berger*, 255 U.S. at 31, also quoted with approval the statement of the trial judge involved in *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), that the intention of what is now designated as §144 was "to cause a transfer of the case without reference to the merits of the charge of bias" and to do so "immediately."

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automatically require a judge to disqualify himself." See p. A-4, *infra*. Instead, relying upon many of the lower court opinions cited above, Judge Harper announced that he conceived it to be his duty to examine into the "legal sufficiency" of the supporting reasons and facts set forth in the affidavit. And without denying that the affidavit was timely filed in good faith, or that it contained a statement of reasons and facts supporting petitioners' belief as to his bias, he proceeded without further elaboration to find that the affidavit "fails to disclose any bias or prejudice personal to these plaintiffs" and hence "is not legally sufficient." In short, he found that the petitioners had not met a burden he gratuitously imposed on them, a burden of convincing him that the stated facts and reasons "establish that the judge is personally biased or prejudiced against the plaintiffs." See p. A-10, *infra*.

Additionally, Judge Harper borrowed a series of lower court innovations, created without benefit of statutory language or purpose, in placing upon the petitioners a three-fold burden:

(a) A burden of stating facts with particularity, rather than conclusions. But §144 expressly permits the statement not only of "facts" but of "reasons," a word that plainly encompasses "conclusions." And the *Berger* opinion recognized that the beliefs and opinions of the party lie at the very heart of a proper §144 affidavit. 255 U.S. at 34.

(b) A burden of presenting such facts as will "convince a reasonable man that a bias or prejudice exists." But however the *Berger* opinion is read, it certainly imposes no higher burden than presenting facts and reasons that "give fair support" to the charge of a biased bent of mind. 255 U.S. at 33.

(c) A burden of presenting facts that show that the bias is personal, as opposed to judicial in nature. But as this Court noted in *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966), by reference to *Berger*, any burden in this respect is merely to show that the alleged bias stemmed from "an extrajudicial source" and resulted in an opinion on the merits "on some basis other than what the judge learned from his participation in the case." Thus, contrary to the ruling below, "personal" bias is that bias acquired from extrajudicial sources, while "judicial" bias is that bias properly acquired by the judge from his assessment of the record. Judge Harper's concept that "personal" bias must relate personally to the petitioners is a perversion of the plain meaning of §144.

The ultimate question posed by Judge Harper's refusal to disqualify himself is whether he is authorized to assess petitioner's affidavits by the foregoing standards or by any other judicial reaction he might have. His memorandum opinions show no more than his own assessment – stated only in the most conclusory terms – that the affidavits fail to establish his bias or prejudice. Without giving these petitioners the slightest assurance that he is in fact impartial (Cf. *Berger*, 255 U. S. at 35-36), Judge Harper has totally ignored the fulcrum of §144 – the bona fide beliefs of the petitioners themselves that he is biased and prejudiced. And he has left unanswered the relevant questions asked by this Court in *Berger* of any judge, particularly one whose connection with a particular case has been brief and who is the target of a disqualification affidavit – "of what concern is it to a judge to preside in a particular case? Of what concern to other parties to have him so preside?" 255 U. S. at 35.

Clearly, the action of Judge Harper as approved by the Eighth Circuit affords this Court a long-overdue opportunity to restore to §144 its original and intended

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meaning. Nearly half a century has elapsed since this Court in *Berger* examined into the language and purpose of §144. Since that time most lower courts have ignored the crux of the *Berger* ruling and converted §144 from an automatic disqualification statute into an invitation to federal district judges to assess the propriety or sufficiency of charges of bias leveled against them. Whether such a conversion is proper is indeed a substantial question.

The problem of judicial disqualification for bias and prejudice is delicate, important and recurring. In the interests proper judicial administration of §144 and in the interests of proper judicial administration of §144 and in the trials by biased judges, the decision below should be reviewed.

III.

Important questions are raised as to the duty of a district judge to disqualify himself for substantial reasons set forth in affidavits of bias and prejudice.

If the *Berger* interpretation of §144 were to be followed, Judge Harper should have automatically disqualified himself upon the filing of the affidavits of bias and prejudice, which met all the formal requirements of §144. But even under the lax standards followed by the post-*Berger* decisions of the lower courts, serious questions are posed by his failure to disqualify himself in light of the unchallenged allegations made against him.

(A) *The failure to disclose fraternity membership.* It is clear, to the point of being virtually the law of this litigation, that membership in a college fraternity that has been named as a defendant in this case constitutes a complete and mandatory disqualification. The interest of

such fraternities in the outcome of the litigation is so direct and substantial, and the membership ties are allegedly so strong, that three other judges at one time connected with this litigation felt compelled to disqualify themselves when the matter was brought to their attention. They have recognized that membership in such a fraternity, like ownership of stock in a corporation that is a party to litigation, is such an interest as to disqualify a member from presiding over the litigation where the fraternity's financial and economic interests are at stake. See *In re Honolulu Consol. Oil Co.*, 243 F. 348 (9th Cir. 1917). Indeed, for a judge who is a member of such a fraternity to preside in such a case as this borders upon a transgression, if it is not an actual violation, of 28 U. U. S. C. §455, which directs a judge to disqualify himself "in any case in which he has a substantial interest."[12]

Judge Harper, who admitted his membership in Delta Theta Phi, a named defendant in the Balfour cases, not only declined to disqualify himself when such matter was formally brought to his attention but knowingly concealed the fact of membership for some time after his assignment to these cases in July of 1969. Not until he was asked in September of 1969 did he reveal his membership, and even then he gave no details as to the extent of his relationship or his association with the fraternity and its officers. He must be presumed to have known that his two immediate predecessors had disqualified themselves

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[12] Section 455 also directs a judge to disqualify himself if he "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

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for that very reason, among others, and that such membership had been consistently determined to be a disqualification in this prolonged litigation.[13]

A serious question is thus posed, deserving of resolution by this Court, as to the duty of a judge to disqualify himself under §144 when membership is conceded in an organization that is party to the case. The question is one that involves most sensitive and important considerations in the right of litigants to expect the fair and unbiased treatment of their claims.

(B) *The ex parte discussions with a previously disqualified judge.* The assertion in the first affidavit that Judge Harper engaged in *ex parte* conversations about the case with the previously disqualified Judge Collinson, thereby causing Judge Harper to become biased, presents a most serious problem in the fair administration of justice in the federal courts.[14] Judge Harper neither denied nor explained these conversations; no explanation was offered as to the scope or content of these conversations and there was no indication as to who else might have been present. Judge Harper dismissed these assertions by arguing that anything in the affidavit dealing with Judge

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13 Judge Harper's only attempt to rationalize his fraternity membership was by reference to the alleged commitment of petitioners' counsel not to proceed against the fraternities and to drop them as defendants. But whether or not such a representation or commitment was made, the interest of the fraternity in either staying in the case or being freed from the hazards of litigation remained the same. Judge Harper further overlooked the allegation that he pressed for such a commitment from counsel without revealing his interest and membership. And in any event, such a possible commitment was irrelevant to petitioners' own belief that Judge Harper's membership indicated a biased bent of mind – the critical factor under §144.

14 The record shows that Judge Collinson, prior to his disqualification, had assertedly sought to bring undue influence to bear on a

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Collinson was not applicable to judging his own disqualification. But such an argument cannot hide the issue that warrants this Court's attention.

Where there has been a history of biased judges, necessitating their disqualification under §144, a substitute judge would appear to be under a particularly strong duty to avoid any *ex parte* contact with any of his disqualified predecessors in connection with the case. It has been said that "the judge who substitutes for a disqualified colleague [should] . . . be particularly ready to disqualify himself if there is any chance that he may not be entirely impartial." Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1434, 1445 (1966). And in order to avoid that chance or even the appearance of partiality, the successor judge should avoid any *ex parte* contact with his biased predecessors that might cause the litigants to suspect that he has absorbed some of the presumed bias and prejudice of the disqualified colleague.

The lack of any authoritative guidance to judges confronted with such a situation involving previously

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Footnote 14 (Continued)
federal judge in a related proceeding in Massachusetts in a manner contrary to the interests of the plaintiffs in the Balfour cases and for the benefit of the Balfour defendants. That assertion was fully set forth in Exhibit A attached to petitioner Murray's affidavit of prejudice, dated August 21, 1969. Exhibit A thus has relevance in explaining the reasons substantiating petitioners' belief that Judge Harper's *ex parte* conversations with Judge Collinson might have affected Judge Harper's impartiality.

Petitioners' fears in this connection were confirmed in their minds upon the entry of Judge Harper's order of August 4, 1969, making a significant and prejudicial change in the pretrial order which no one had suggested to Judge Harper but which had been earlier suggested by Balfour to Judge Collinson. See Second Supplemental Affidavit of Bias and Prejudice, paragraph 7.

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disqualified colleagues bespeaks a need for consideration and resolution of the problem by this Court. That problem may appropriately be dealt with in the context of a §144 claim of bias and prejudice, for it is as much in the interest of the litigants to know what to expect of presiding judges in this situation as it is in the interest of the judges themselves to be advised of the standard of fair conduct which they must follow.

(C) *The resort to sources outside the record.* As fully documented in the first affidavit and as conceded by Judge Harper in his memorandum opinion (p. A-9, *infra*), Judge Harper utilized extrajudicial materials in formulating many of his allegedly biased judgments and rulings in the pretrial proceedings. Not only did he consult Judge Collinson outside the record, but he used an extensive extrajudicial document – purportedly prepared by the clerk as "a synopsis or abstract of the pleadings and record" but never introduced into the record or shown to the petitioners or their counsel.

This Court has repeatedly and consistently condemned the use of extrajudicial matters that deprives a litigant of the right to be confronted with and to cross-examine the evidence against him. See, *e.g.*, *Green v. McElroy*, 360 U. S. 474, 496-497 (1959). No less is such practice to be condemned when it appears in the context of biased rulings and determinations. Indeed, it is precisely the use of such extrajudicial material that constitutes the "personal" aspect of the bias and prejudice concept of §144. See *United States v. Grinnell Corp.*, 384 U. S. 563, 583 (1966); *Craven v. United States*, 22 F.2d 605, 607-608 (1st Cir. 1927). And while it may often be difficult to establish the extrajudicial source of bias and prejudice, *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2nd Cir. 1968), the instant case presents no such problem. The extrajudicial source of the alleged bias is conceded.

There remains the need for this Court to announce in no uncertain terms that federal judges may not predicate their rulings upon documents not introduced into the record and that the filing of an affidavit alleging that biased rulings were predicated upon such extrajudicial sources is sufficient to compel the offending judge to disqualify himself under §144.

(D) *The pattern of unfair conduct, lack of candor and reliance on rulings of biased and disqualified judges.* The documented allegations in this case that Judge Harper has exhibited a pattern of conduct that is not only biased but amounts to a denial of due process are virtually unparalleled in federal judicial history. He has, according to the undenied allegations, (1) neglected to reveal his membership in a fraternity named as a party defendant, until forced by the petitioners to admit his membership, (2) refused to reveal the content or source of documents from which he made allegedly biased rulings, (3) consulted off the record with a previously disqualified judge, (4) renewed and perpetuated prior orders entered by disqualified and biased judges without regard to petitioners' claims that such orders were unfair and improper, (5) established a pretrial pattern that gives every advantage to the opposing Balfour defendants and, by a discriminatory application of the priority rule, has made it impossible for petitioners to complete their discovery prior to trial, (6) established a date for the filing of petitioners' narrative statement without regard to and before any possible completion of discovery, (7) ignored petitioners' request that a reporter be present at the pretrial conference of July 29, 1969, when important rulings and directives were made,[15] and (8) purportedly dismissed all objections to

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[15] Congress has required that a reporter be present at all court proceedings "as may be requested by any party to the proceeding." 28 U. S. C. §753(b). Judge Harper's stated reason for not acceding (Continued)

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matters occurring before July 29, 1969, while discriminatorily retaining the threat of the defendants' antecedent motion to have the petitioners or their counsel penalized in connection with their efforts prior to that date to uncover evidence allegedly concealed by the defendants.

Such allegations, documented thoroughly as to facts, cannot be dismissed as frivolous. Nor can they be said to lack the substantiality or legal sufficiency that the lower courts have indicated is necessary to compel a judge to disqualify himself under §144. On the contrary, the substantiality and the sufficiency revealed by this pattern of conduct are overwhelming in nature, to the point where the very reputation of the federal judiciary is at stake in terms of its ability and willingness to protect litigants against such actual and seeming unfairness. That fact alone justifies and indeed demands review of this proceeding by this Court.

And among the plethora of issues that arise out of this long pattern of discriminatory and biased judicial actions is one not previously discussed that is particularly relevant to the appropriateness of certiorari. Judge Harper's constant reliance on and perpetuation of previous orders entered by disqualified judges, orders that themselves are allegedly discriminatory, raise a most serious problem deserving of this Court's consideration. Should any allegedly discriminatory order entered by a disqualified judge be considered void?[16] Is a successor judge free to ignore any objections to such an order and to rely on and perpetuate that order? Can any proceeding that is impregnated with

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Footnote 15 (Continued)
to the request was that he had not expected that anything would happen at the conference. Paragraph 13 of petitioner Murray's original affidavit of bias. But the actions there taken belie the candor of that explanation.

16 The general rule is "that if a judge is disqualified he shall not sit; and that a court in which he with other judges participates is not properly constituted, and its judgments ought not to stand." 1 Freeman, *Judgments* 657 (5th ed. 1925).

such orders be considered fair? Must not the successor judge make a *de novo* examination of the record and issue *de novo* rulings freed from any possible contamination by the prior orders?

The substantiality of those questions is augmented by the ruling of this Court in *McClaughry v. Deming*, 185 U. S. 49 (1902), holding invalid an order issued by a court-martial composed of officers incompetent to sit thereon. In the course of that opinion, 185 U. S. at 67-68, the Court quoted with approval from an early New York decision (*Oakley v. Aspinwall*, 3 N. Y. 547) that ruled void a judgment rendered by a judge disqualified to sit "by reason of consanguinity to one of the parties." The reason why such a judgment must be voided, said the New York court, was that

> "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important in that respect that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness."

And this Court added its own observation that "A judge, who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction." 185 U. S. at 68.

The Sixth Circuit's ruling in *American Cyanamid Company v. F.T.C.*, 363 F.2d 757, 767 (1966), further illustrates this basic notion that the participation of a disqualified judge or administrator in a judicial-type proceeding amounts "to a denial of due process which invalidated

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the order under review." There a commissioner was found disqualified, necessitating a new hearing, due to his prior actions as a congressional committee counsel investigating the same facts, issues and parties involved in the agency proceedings. And here the application of the *American Cyanamid* doctrine would mean the voiding of all pretrial orders and directions entered by judges who have disqualified themselves on charges of bias and prejudice.

It is of obvious importance that this Court now determine the applicability of this voidness doctrine to orders entered by disqualified judges, orders which in themselves are the targets of charges of unfairness and bias.

IV.

An important problem is presented as to the number of affidavits of bias allowable under §144 in multiparty litigation.

While Judge Harper's Memorandum Opinion of September 8, 1969, puts the matter in the alternative, the first and perhaps the primary point made in that opinion is that the original affidavit filed herein by the petitioner James A. Murray was barred by provision of §144 that "A party may file only one such affidavit in any case."[17] This conclusion was reached by viewing all the thirteen Balfour cases as an interrelated unit, indistinguishable as to the issues involved, and by treating the Buchroeder affidavit (filed only in Cases Nos. 683, 684 and 729) as the one affidavit allowable as to any one party under §144.

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[17] Judge Harper did not invoke this provision of §144 with reference to the petitioners' second affidavit, accompanying the motion for rehearing, which dealt with Judge Harper's fraternity membership. That second affidavit was found insufficient for reasons not entirely clear.

Such a ruling ignores both the reality of this litigation and the plain meaning of §144. All the Balfour cases are related with respect to the basic antitrust issues involved. But that identity springs primarily from the identity of the Balfour defendants in the various cases and the acts they allegedly engaged in. The plaintiffs, however, have filed separate and distinct suits; as to each of them the relief and the damages sought are different and some of their other problems of proof may well be distinctive. And the fact that Judge Collinson saw fit to disqualify himself in all these related cases, although the Buchroeder affidavit was filed in only three of them, cannot destroy the separateness of the parties plaintiff.

Moreover, the Buchroeder affidavit claimed only that the plaintiff Buchroeder had reason to believe that Judge Collinson was biased and prejudiced. Nothing was claimed therein as to the beliefs in this respect as to Judge Harper, who was not then involved in the case, or as to the plaintiffs in the other related but separate cases. Cf. *United States v. Hoffa*, 382 F.2d 856, 861 (6th Cir. 1967).

Section 144 provides quite simply that "A party may file only one such affidavit in any case." No proscription is made against the filing of an affidavit by a party different from the one who filed an earlier affidavit. The proscription runs only against the identical party filing two or more affidavits; and that is all that *Martin v. Texas Indemnity Insurance Company*, 214 F. Supp. 477 (N. D. Tex. 1962), cited by Judge Harper, can be said to hold. Since Buchroeder is and was a party different and distinct from the petitioner Murray, the latter cannot be considered barred under §144 from filing his own affidavit as to his own beliefs as to the bias exhibited toward him by an entirely different judge.

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To hold that a party is barred under these circumstances from filing an affidavit under §144, or even from filing supplemental affidavits alleging new facts sustaining the belief that a judge is biased, is to raise critical problems of constitutional due process. The right to a fair trial is so much of the essence of due process, *In re Murchison*, 349 U. S. 133, 136 (1955), that forcing an individual party to go to trial before a judge who is or may be prejudiced against him must be considered violative of the constitutional guarantee, particularly where, as here, the judge's association with one of the parties in the case may reflect a substantial interest in reaching a conclusion against the litigant in his case. See *Tumey v. Ohio*, 273 U. S. 510, 523 (1927).

Avoidance of those constitutional involvements can be achieved only by giving §144 the plain reading that its plain language demands, thereby giving the petitioner Murray the right to file his affidavit without regard to the prior Buchroeder affidavit. This problem in statutory interpretation is both important and likely to be of a recurring nature as multiparty litigation increases in the federal courts. For that reason, certiorari should be granted.

CONCLUSION

The situation revealed by this petition is a most aggravated one. Seldom if ever in American judicial history has any litigation been beset with a pattern of bias and prejudice on so continuing a basis. Not since the retirement of Judge Duncan more than four years ago have the Balfour cases been administered by a judge free of bias and prejudice. The petitioners have thus been denied their right to a fair tribunal for over four years. To repeat the words of the Sixth Circuit in *American Cyanamid Company v. F. T. C.*, 363 F.2d 757, 767: "It is fundamental that both unfairness and the appearance of unfairness

should be avoided. Wherever there may be reasonable suspicion, it is best to disqualify." That is the practice that this Court should direct in this case.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 20,048

JAMES A. MURRAY and EDITH B. MURRAY, partners, doing business as NASSAU CHINA COMPANY,

Petitioners,

v.

THE HONORABLE ROY W. HARPER, Judge of the United States District Court and of the Eastern and Western Districts of Missouri,

Respondent.

ORDER

Upon due consideration of petition for writ of mandamus or prohibition and supporting documents, it is ordered that the petition should be and the same is hereby denied.

BY THE COURT

Dated this 9th day of December, 1969.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

[Filed September 8, 1969]

JAMES A. MURRAY and EDITH B. MURRAY, partners, doing business as NASSAU CHINA COMPANY,

Plaintiffs,

v.

LLOYD G. BALFOUR, *et al.*,

Defendants.

No. 737

MEMORANDUM OPINION AND ORDER

This matter is presently pending before this court on a motion to disqualify the judge.

28 USCA 144 provides the specific means whereby the plaintiffs may assert the alleged personal bias or prejudice of a judge as a cause for his recuse. This section reads:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either *against him* or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

> "The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

It is perfectly obvious that the existence of a completely fair and impartial tribunal is the most basic requirement of due process. Without that, our judicial system would be a farce. As stated, "[D]emocracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness." *In re J. P. Linahan*, 138 F.2d 650, 651 (2nd Cir. 1943). See, *e.g.*, *In re Murchinson*, 349 U.S. 133 (1955). But the impartiality required is not a strict neutrality. It is, of course, impossible for our judges to come into their court rooms devoid of their own personal experiences, beliefs and backgrounds. *In re Linahan, supra*; *Ex parte N. K. Fairbank Co.*, 194 Fed. 978, 898 (D. C. Ala. 1912); *In re Union Leader Corp.*, 292 F.2d 381, 388 (1st Cir. 1961). "For example, prior judicial views will not disqualify." *In re Union Leader Corp., supra*, at 388; *Denis v. Perfect Parts, Inc.*, 142 F. Supp. 259 (D. C. D. Mass. 1956).

As noted, "[T]he statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias (or state of mind, 255 U.S. 42) against wrongdoers, civil or criminal, acquired from

evidence presented in the course of judicial proceedings before him. Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective." *Craven v. United States*, 22 F.2d 605, 608 (1st Cir. 1927). Thus, what the statute is designed to remedy is the situation in which the judge in question is alleged to have a bias or prejudice against these plaintiffs of such a nature that it would prevent that judge from presiding in a fair and impartial manner. It would seem that in a trial before a jury, such allegations must be particularly serious to warrant a judge withdrawing.

It has been repeatedly stated by many authorities that the judge involved has a duty to remain as judge in a particular instance and that this duty is equally as strong in his duty under this statute to recuse himself. *In re Union Leader Corp., supra*, at 391; *Simmons v. United States*, 302 F.2d 71 (3rd Cir. 1962); *In re Federal Facilities Realty Trust Co.*, 140 F. Supp. 522, 524 (N. D. Ill. 1956).

Clearly, the mere fact that an affidavit of prejudice has been filed by the plaintiffs does not automatically require a judge to disqualify himself. *United States v. Hanrahan*, 248 F. Supp. 471, 475 (D.C. D.C. 1965); *United States v. Gilboy*, 162 F. Supp. 384, 388 (M.D. Pa. 1958). The judge attacked by the affidavit must, however, initially determine the legal sufficiency of the affidavit and the facts that are stated therein. See, *e.g., United States v. Hanrahan, supra; Green v. Murphy*, 259 F.2d 591, 593 (2nd Cir. 1958). In essence, it must be said that the statute here provides the plaintiffs with the means whereby they can insure that their trial is free from any personal bias or prejudice, subject only to their ability to allege facts to support

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their claim and their attorney's duty to certify good faith in the filing of the affidavit. *Mitchell v. United States,* 126 F.2d 550, 552 (10th Cir.), cert. denied, 316 U.S. 702 (1942). The plaintiffs and their attorney's sense of ethics are the sole limits provided by this section. The court is precluded from refuting the facts alleged regardless of their nature. It cannot pass on their truth, but rather must accept them as fact. Hence, review is limited to sufficiency and compliance with the statute. *Berger v. United States,* 255 U.S. 22 (1921); *Ex parte American Steel Barrel Co.,* 230 U.S. 35 (1913); *Korer v. Hoffman,* 212 F.2d 211 (7th Cir. 1954); *United States v. Parker,* 23 F. Supp. 880 (D. N.J. 1938), aff'd, 103 F.2d 857; *Johnson v. United States,* 35 F.2d 355, 357 (D. C. Wash 1929).

At the outset of the inquiry the judge is presumed to be qualified to hear the case, and there is a substantial burden upon the plaintiffs to demonstrate that such is not the case. *In re Union Leader Corp., supra,* at 389. As stated in *In re American Steel Barrel Co., supra,* at 43: "[T]he basis of disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his function in a particular case."

The burden upon the affiant to provide this basis is threefold. First, the affidavit must state *facts* with sufficient particularity. Only the facts contained therein are relevant, not conclusions. *Inland Freight Lines v. United States,* 202 F.2d 169 (10th Cir. 1953). Second, the facts must be such as to convince a reasonable man that a bias or prejudice exists. *United States v. Hoffa,* 245 F. Supp. 772 (E. D. Tenn. 1965); *Berger v. United States, supra,* at 33-34. Third, "[I]n addition to establishing that a prejudice or bias harbored by a judge is of such a nature that it has, or may have, closed his

mind to justice, the factual allegations must also show that this bias is *personal*, as opposed to *judicial* in nature." *United States v. Hanrahan, supra,* at 476; *Gallarellie v. United States,* 260 F.2d 259 (1st Cir. 1958); *United States v. Gilboy, supra,* at 394. (In ascertaining whether or not this burden has been met by the affiant, the law clearly has developed so that the statutory requirements are to be strictly followed. *Scott v. Beams,* 122 F.2d 777, 778 (10th Cir. 1941). That the bias demonstrated must be personal is of the greatest significance. *Craven v. United States, supra,* at 607; *In re Union Leader Corp., supra,* at 388. The bias or prejudice complained of must relate to these individuals as such. See *United States v. Hanrahan, supra, In re Federal Facilities Realty Trust Co., supra,* at 526. Judicial "bias" is not sufficient. It would be less than natural if certain attitudes were not developed over the years one spends on the bench. It would indeed be strange if "a judge became less qualified the greater his judicial experience."

Having outlined in a general way the applicable law, a view at the motion is appropriate. The circumstances presented are these:

This case is one of a series of thirteen (the other twelve being Nos. 683, 684, 729, 736, 751, 752, 753, 754, 755, 792, 1193 and 1194), which were recently assigned to this United States District Judge. The characterization of these cases is well set out in a memorandum filed by the plaintiffs' attorneys in their case in support of the motion to stay all proceedings filed in the other twelve cases on September 2, 1969. There were two such memoranda. They are in part almost identical, and I shall quote from the one filed in Cases Nos. 683 and 684, as follows: "Because of

the identify of the issues in all of the said cases, although there is no identity of parties, all of the said cases have for many years been treated and handled as a single group or unit and rulings made in one case have generally been applicable to all of the cases in the group. The issues raised by the 'Motion to Change Judge' in Case No. 737 are common to all of the cases in the group, including the above identified cases, and the disposition of the 'Motion to Change Judge' in Cause No. 737 would be dispositive of the identical issue which exists in each of the two above identified cases as well."

A similar sentence to the second sentence quoted above is found in the memorandum in support of the Motion to Stay all Proceedings filed in the other ten cases. Each of these memoranda were submitted on behalf of the plaintiffs in ten antitrust cases and on behalf of the defendant in its antitrust counterclaims in the first two cases.

There were several pre-trial orders previously entered in these thirteen cases, the first of which was filed on May 19, 1967, and paragraph 1 of that order says in part as follows: "All of the above-captioned actions may be referred to as the 'Fraternity-Buchroeder-Balfour cases', which description shall be understood to embrace all of said cases. All motions, pleadings, orders or other filings * * * shall be deemed to apply equally to each of the * * * actions as though individually filed therein." This has been carried out in subsequent pre-trial orders made in the case.

The plaintiffs in this case support their motion by an affidavit of prejudice directed against this judge, and attach thereto a 62-page affidavit directed against Judge Collinson, the judge who prior to this judge

presided in this matter until his disqualification. Additionally, the motion is supported by certificate of counsel and generally speaking adopts the suggestions used in a similar motion filed against Judge Collinson in Cases Nos. 683, 684 and 729, which brought about Judge Collinson's disqualification in those three cases and in the other cases as well. 28 USCA 144, quoted, *supra*, states in part: "A party may file only one such affidavit in any case."

In *Martin v. Texas Indemnity Ins. Co.*, 214 F. Supp. 477, cert. denied, 377 U.S. 971, a motion filed to disqualify the second judge in the case was denied. While the prior motion disqualifying Judge Collinson was filed only in Cases Nos. 683, 684 and 729, it led to his disqualification in all of the cases, as the cases have been treated as a single group or unit, and as set out in the memoranda in support of the two motions to stay all proceedings, a ruling by this judge on the Motion to Change Judge in Case No. 737 would be dispositive of the identical issue which exists in each of the identified cases as well.

Accepting and agreeing with this statement as properly describing the situation, in view of the statute itself and the ruling in the *Martin* case, *supra*, the motion must be denied.

If, however, it be determined that this is only applicable to Cases Nos. 683, 684 and 729, in which the prior affidavit was filed against Judge Collinson leading to his disqualification in those cases, it would be necessary to turn to the affidavit filed in this case to determine its sufficiency. Exhibit A attached to the affidavit, being the affidavit which the affiant states he intended to file against Judge Collinson had he not disqualified in the case, is of no significance in this case because it deals entirely with Judge Collinson and is not applicable with respect to this judge.

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Turning to the affidavit filed by James A. Murray with respect to this judge, we find that it is fifteen pages in length, exclusive of Exhibit A, and contains some nineteen numbered paragraphs. Other than the allegation that this judge has a personal bias and prejudice and is unable to exercise his judicial functions impartially and fairly, the first twelve paragraphs deal with matters which occurred in these cases prior to this judge's entry into them, and the language just referred to is a conclusion, not a fact nor a reason, and legally insufficient to comply with the requirements of this statute to disqualify a judge.

Paragraphs 12 through 18 of the affidavit deal with this judge. They refer to a conference which occurred on July 29, 1969. When the cases were assigned to this judge he went to Kansas City on July 28th and spent the entire day in familiarizing himself with the files in these cases prior to the conference referred to. Paragraphs 12 through 18 dealing with the conference with respect to this judge set out that he expressed views as to facts of issues and law which were the same as made by prior judges in the case. After the conference had started it was requested that a court reporter be present because of the fact that this judge stated that he had conferred previously with Judge Collinson, the prior judge in the case, and the fact that this judge referred to a synopsis or abstract of the pleadings and records in the Balfour case and later refused the request of plaintiffs' counsel to supply them with a copy.

An examination of paragraphs 12 through 18 does not meet requirements necessary for the judge to disqualify in the case. As set out, *supra*, the affidavit must state facts, not conclusions, and must be such as to convince a reasonable man that a bias or prejudice exists which is of such a nature that it has or may have closed the judge's mind to justice. The

factual allegations must show that this bias is personal as opposed to judicial in nature. The affidavit of James A. Murray does not meet these requirements.

While this judge cannot go beyond the affidavit itself, for the affidavit to be proper it must set out statements made by the judge and action taken by the judge which discloses his prejudice, which the affidavit does not do. The affidavit itself fails to disclose any bias or prejudice personal to these plaintiffs. It is not legally sufficient, for to be so it must state facts which establish that the judge is personally biased or prejudiced against the plaintiffs. *Berger v. United States, supra.*

It is well settled that an affidavit must give "fair support to the charge of a bent mind that may prevent or impede impartiality," *Berger v. United States, supra,* and that it must be "sufficient to fairly convince a sane and reasonable mind that such attitudes on the part of the attacked judge do exist." *United States v. Hoffa, supra.*

"It is the trial judge's duty to prevent a [party] from utilizing an affidavit of prejudice for the sole purpose of delaying and otherwise unjustifiably embarrassing the administration of justice." *United States v. Birrell,* 276 F. Supp. 798. There is a presumption that the judge is qualified and, therefore, there is a substantial burden upon the plaintiffs to make a showing to the contrary, and there is as much of an obligation upon the judge not to recuse himself in situations where there is no occasion for him to do so as there is for him to recuse himself where the allegations in the affidavit are sufficient. *In re Union Leader Corporation,* 292 F.2d 381, cert. denied, 368 U.S. 927.

For the reasons heretofore outlined the plaintiffs' motion will be denied.

/s/ Roy W. Harper
U. S. District Judge

[Filed October 29, 1969]

ORDER

This matter is presently pending before this Court on a motion for rehearing for motion for change of judge which was filed on October 14, 1969. Attached to the motion is a supplemental affidavit of prejudice sworn to by James A. Murray and certificate of good faith executed by Mr. Murray's attorneys.

The principal basis for the supplemental affidavit has to do with this judge's affiliation with Delta Theta Phi law fraternity.

The petition filed in this matter included the L. G. Balfour Company and multiple defendants. The multiple defendants included among others a number of fraternities and sororities. The records disclose that no efforts have been made at any time to secure service on other than the L. G. Balfour Company, either in this case or the companion case.

The files in these cases would indicate that Mr. Murray's attorneys have represented to the other judges in these cases that none of the plaintiffs in these cases intended to proceed against any of the fraternity or sorority defendants or any of the other defendants except

the Balfour Company. An example of such representation is paragraph (f), page 17, of plaintiffs' reply to supplemental suggestions of defendant, L. G. Balfour Company, in opposition to plaintiffs' motion for leave to file amended and supplemental complaints filed November 13, 1968. Reference is made to this particular paragraph because the amended and supplemental complaints included a number of fraternities and sororities as well as other defendants other than the Balfour Company. In the original suit filed in this case the Delta Theta Phi was not a named plaintiff, but in the purported amended complaints, where some substitutions were made from the original complaint, it is alleged as a party plaintiff, but after it was lodged with the court the plaintiffs' attorney, as set up above, indicated that they did not intend to proceed against any of the fraternity or sororities defendants.

Further, at the first conference held by this judge with the attorneys in late July of 1969, Mr. Spanos, attorney for the plaintiffs in this and the companion cases, represented to me that none of the plaintiffs in any of the cases intended to proceed against any of the fraternity or sorority defendants, and Mr. Spanos further indicated to me that he would dismiss these defendants from the various cases within a month.

An examination of the affidavit filed with respect to the motion before the court speaks clearly as to what has occurred when we consider it in connection with the other motions which have been filed with respect to the matter.

Plaintiffs' motion for rehearing for motion for change of judge is denied in all respects.

/s/ Roy W. Harper
U. S. District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

[Filed July 3, 1969]

J. A. BUCHROEDER & COMPANY, *Plaintiff,* v. L. G. BALFOUR COMPANY, *et al.*, *Defendants.* and RELATED CASES	Nos.	683 753 684 754 729 755 736 792 737 1193 751 1194 752

ORDER

J. A. Buchroeder & Company, by its president and chief stockholder, has filed a motion for change of judge in cases Nos. 683, 684 and 729, in which it is a party. The motion is accompanied by an "Affidavit of Prejudice" executed by the president, and a certificate as to good faith signed by the present attorneys for the Company.

This motion is filed under Section 144, Title 28 U.S.C. Under the rule established by the Supreme Court in the case of *Berger v. U. S.*, 255 U.S. 22, the factual allegations of the affidavit may not be questioned, but must be taken as true for the purpose of the motion, and the only matter for decision by the Court is whether the facts as alleged give fair support to the charge of bias and prejudice, and whether the motion is timely filed. Although this Court has grave doubts on both points, the Court has determined to resolve these doubts in favor of the moving party. This Court feels that the prime consideration is public

confidence in impartiality of the judiciary, and the present system, whereby the judge whose impartiality is questioned passes on the adequacy of the affidavit, places that judge in an embarrassing and peculiar position.

When the Honorable John W. Oliver's impartiality was questioned by the same counsel, he promptly disqualified and transferred these cases to this division; and this is the natural reaction of any judge under the same circumstances. Just why this affidavit had to contain several pages of disparaging remarks about Judge Oliver is not clear to this Court.

Many of the cases and text writers which discuss disqualification of judges stress the belief that in this situation the "appearance" of impartiality is of the utmost importance, rather than the true test of whether there is actual bias and prejudice. This appears to be the reason for the extremely galling rule that the truth of the allegations cannot be inquired into or disputed in any way. The reading of this affidavit from a judicial viewpoint, with the knowledge that I had to accept these allegations as true and pass on their legal sufficiency, has been my most unpleasant experience in twenty years on the trial bench. However, I certainly would not want to preside at a trial at which counsel for one of the parties felt about the Court as, obviously, counsel for the movant must.

For the above reasons, it is hereby

ORDERED that the motion for change of judge in cases Nos. 683, 684 and 729 be, and is hereby, sustained, and further

ORDERED that because of the related nature of all the above listed cases and the common discovery, which has already been had, this Court hereby disqualifies in

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the remaining cases listed above upon its own motion, and ORDERED that all the cases may be assigned to another judge.

Since the Honorable Elmo B. Hunter is the only active judge of this court who is not disqualified in these cases, it will be necessary for him to make any future orders which are necessary.

/s/ William R. Collinson
District Judge

[Filed April 1, 1968]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PHI DELTA THETA FRATERNITY, *Plaintiff,*	:	
v.	:	No. 683
J. A. BUCHROEDER & COMPANY, *Defendant.*	:	

MEMORANDUM AND ORDER OF TRANSFER

The files and records in this case show that after we entered our order of March 12, 1968 complications have developed concerning the manner in which defendant and counter-claimant Buchroeder's motion for production filed February 26, 1968 should be processed.

The record reflects that when the group of cases of which this case is one was transferred to this Division of this Court, all parties were advised that the Judge of this Division had joined Phi Delta Theta Fraternity when a student some thirty years ago at the University of Missouri. All parties, by their then counsel, then expressly waived any right to raise any question concerning any possible disqualification of the Judge of this Division, pursuant to Section 455 of Title 28, United States Code, or otherwise.

Since that waiver was made at the outset of the handling of the associated cases by the Judge of this Division, there have been a number of changes in counsel who have been and are now actively engaged in the preparation of these cases for trial. At least some of the new counsel were unfamiliar with the fact of the initial waiver.

Apart, however, from any question of whether there has been any change of circumstance since the original waiver was made, it is my judgment that, regardless of how I might rule the pending motion, and regardless of how I might direct further proceedings in this and other associated cases, there exists a real possibility that at least some of the parties might entertain some doubt, reasonably or unreasonably, of my total lack of interest in regard to the group of cases that pend before me. I have therefore determined to take what I deem to be appropriate action before receiving further advice from any of the parties or their counsel.

In *Public Utilities Comm'r. v. Pollak*, 343 U.S. 451 at 467 (1952), Mr. Justice Frankfurter noted that Judges refuse to continue to sit in particular cases for a variety of reasons. He stated that it was his "view that it is desirable to state why [a judge] takes himself out of a case." I share that view.

I also agree with Mr. Justice Frankfurter's suggestion that "the guiding consideration" that controls when a judge recuses himself "is that the administration of justice should appear to be disinterested, as well as be so in fact."

It is my judgment that the manner in which the question of my college membership in Phi Delta Theta has been recently injected could be said to not unfairly lead persons unacquainted with the actual facts concerning my total lack of interest to believe that some sort of unconscious feeling might operate on the ultimate judgments that I will be required to make in the further preparation and trial of this group of cases.

Under these circumstances, I am convinced that the pending motion to produce and all other proceedings should be ruled and directed by another Judge of this Court. I have consulted with the Honorable William R. Collinson, Judge of Division No. Two, and he is agreeable to accept the transfer all of the cases.

For the reasons stated, the following cases now pending in this Division should be and hereby are transferred to the Honorable William R. Collinson, Judge of Division Two of this Court, for all further proceedings:

683 *Phi Delta Theta Fraternity v. J. A. Buchroeder & Company*

684 *Sigma Chi Corp. and Sigma Chi Fraternity v. J. A. Buchroeder & Company*

729 *J. A. Buchroeder & Co. v. Lloyd G. Balfour, et al.*

736 *Columbus Stationery Co. v. Lloyd G. Balfour, et al.*

737 *James A. and Edith B. Murray v. Lloyd G. Balfour, et al.*

751 *Edward F. Miller v. Lloyd G. Balfour, et al.*

752 *H. F. Michaelis v. Lloyd G. Balfour, et al.*

753 *William G. Underwood v. Lloyd G. Balfour, et al.*

754 *James L. Lester, Jr. v. Lloyd G. Balfour, et al.*

755 *H. E. Pennington v. Lloyd G. Balfour, et al.*

792 *H. O. Farris v. Lloyd G. Balfour, et al.*

1193 *Joseph Franke, d/b/a Campus Jewelers v. Lloyd G. Balfour, et al.*

1194 *Jack Grace, d/b/a Grace Sales Co. v. Lloyd G. Balfour, et al.*

Further, it is

ORDERED that a copy of this order shall be filed in each of the listed cases and that such filing shall be considered as our order of transfer in that particular case to Division Two of this Court.

/s/ John W. Oliver
District Judge

Kansas City, Missouri
April 1, 1968

The above order was considered by the Court *en banc*, Chief Judge Becker not participating for the reason that he was counsel for some of the parties before his appointment as a United States District Judge. This order is entered by Judge Oliver with the approval of the Court *en banc*, Chief Judge Becker not participating for the reason stated.

/s/ William R. Collinson
District Judge

/s/ Elmo B. Hunter
District Judge

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[Filed August 16, 1967]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

J. A. MEYERS & COMPANY, INC., a corporation,	:	
Plaintiff,	:	
v.	:	
LLOYD G. BALFOUR, an individual; L. G. BALFOUR COMPANY, a corporation, *et al.,*	:	**No. 67-1118-IH**
Defendants.	:	

ORDER TO REASSIGN CASE

The undersigned Judge, to whom the above-entitled and numbered cause was assigned pursuant to Local Rule 2, feeling that he should not sit on the trial, by reason of one of plaintiff's counsel was an associate in my law office for a considerable period. I am a life member of one of the defendant fraternities, friendly with its national officers, recipient of a number of honors from it and quite active in its alumni affairs. My wife was a member of one of the defendant sororities and is quite active in its local alumni organization. hereby orders the case transferred for reassignment by the Clerk in accordance with Local Rule 2 or other applicable rule or order of this Court [28 U.S.C. §137]; and

IT IS FURTHER ORDERED that the Clerk this day forward copies of this Order by United States mail to the attorneys for the parties appearing in this cause.

August 16, 1967. /s/ Irving Hill
[Jurat] U. S. District Judge